

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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**Interest representatives'
obligation to register in the
Transparency Register: EU
competences and commitments
to fundamental rights**

In-depth analysis for the AFCO Committee





DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

CONSTITUTIONAL AFFAIRS

Interest representatives' obligation to register in the Transparency Register: EU competences and commitments to fundamental rights

In-Depth Analysis

Abstract

The following study examines whether the EU is entitled to the powers to apply regulations that oblige interest representatives to register in the Transparency Register. The limitations that apply by virtue of fundamental rights to the application of such regulations will also be outlined. The study arrives at the conclusion that an obligation to register could only be established on the basis of Article 352 of the Treaty on the functioning of the European Union. Compliance with fundamental rights depends on the scope of application, the nature of the obligations and the sanctions.

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LIST OF ABBREVIATIONS

TFEU TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

EU EUROPEAN UNION

CJEU COURT OF JUSTICE OF THE EUROPEAN UNION

TEU TREATY ON EUROPEAN UNION

TCE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

CFR CHARTER OF FUNDAMENTAL RIGHTS

EXECUTIVE SUMMARY

The present study seeks to elaborate and clarify the legal framework for the establishment of a mandatory registration in the EU transparency register.

The establishment of such an obligation to register would touch upon the fundamental freedom of citizens and organisations to communicate freely with their parliamentary representatives and EU public officials. Such freedom to participate in the democratic process includes the freedom of confidential communication. In introducing a mandatory registration the EU would affect the underlying legitimacy and control structures to which it owes its democratic legitimacy.

The study concludes that Article 11 TEU and Article 15 TFEU do not have the quality of competence provisions. They cannot serve as the legal basis for a mandatory requirement.

Article 298 TFEU aims to establish an open, efficient, and independent European Administration. The provision may arguably serve as a legal basis for a transparency requirement with regard to interest representation in concrete and specific EU administrative procedures. It does not support the establishment of the general status of "interest representative". Moreover, Article 298 TFEU cannot serve as a legal basis for the regulation of interest representation in the EU law-making process.

The concept of "implied powers" may not be used to broaden the scope of Article 298 TFEU beyond the regulation of the EU administrative process. The proper functioning and use of Article 298 TFEU is not dependent on the regulation of interest representation in the area of EU law-making.

The establishment of mandatory registration could be effected on the basis of Article 352 TFEU.

Mandatory registration would interfere with EU fundamental rights. It would limit the freedom of expression protected in Article 11 of the EU Charter, the economic freedom of enterprise protected in Article 15 of the EU Charter and (arguably) the right to privacy in Article 7 and 8 of the EU Charter.

The EU legislator would pursue a legitimate objective in increasing the transparency of EU law-making and administrative processes. The proportionality of the mandatory registration would depend on the specific configuration of the requirement and the sanctions imposed in case of a violation.

1. SCOPE OF THE STUDY

The issue of whether and how interest representation (known as lobbying) should be regulated within the process of formulating and implementing EU policies has already been a topic of discussion for many years.¹

The European Parliament issued the first regulations on registration of interest representatives in 1996, which covered the use of a register and a Code of Conduct. The legal basis for this was embedded in the Rules of Procedure of the European Parliament.² The aim of the regulations was to obtain information about who was participating in decision-making processes and which interests they represented. Individuals and organisations who registered became entitled to freely access the premises of the European Parliament. The European Commission set up its register in June 2008, which was restricted to organisations. No special rights or privileges were associated with registration. In 2011, an intern agreement was reached between the European Parliament and the European Commission, as part of which a joint register was created.³ In principle, the scope of this register covers all individuals and organisations who wish to be engaged in the process of formulating and implementing policy decisions by the European Union. The agreement formulated the 'expectation' that these individuals and organisations will register and agree to abide by the Code of Conduct. Registration entails the right to freedom of access in principle to the premises of the European Parliament. A contravention of the provisions of the Code of Conduct brings the risk of suspension or withdrawal of membership in the register, as well as the revocation of privileges related to access to the rooms of the European Parliament. The Council of the European Union is not party to the institutional agreement.

As early as the negotiations that led to the conclusion of the Interinstitutional Agreement, the implementation of an obligation to register in a 'transparency register' was already under discussion.⁴ In the European Parliament decision in which the European Parliament approved the agreement,⁵ the European Parliament 'repeats ... its call for the mandatory registration of all lobbyists on the Transparency Register' (No 5 of the Decision). The European Parliament and the European Commission have since established a joint working party, which discusses the options for reforming the provisions on the Transparency Register.

¹ Cf. for example, from the early period of integration development: H. Rittstiegl, *Wirtschaftsverbände und europäische Gemeinschaften. Eine Untersuchung zur institutionalisierten Interessenvertretung*, 1967. From more recently: A. Geiger, *Lobbyisten – des Teufels Advokaten?* European Journal of Business Law 2003, 385; C. Woll, *'Herrschaft der Lobbyisten in der Europäischen Union?'* in: *Aus Politik und Zeitgeschichte* 15/16 (2006), 33; T. Hoppe, *'Transparenz per Gesetz – Zu einem künftigen Lobbyisten-Register'*, *Zeitschrift für Rechtspolitik (ZRP)* 2009, 39; H. Sodan, *Lobbyregister als Verfassungsproblem*, Landes- und Kommunalverwaltung (LKV) 2012, 193; M. Krajewski, *'Rechtliche Grundlagen eines verbindlichen Registers für Lobbyisten in der EU'*, *Zeitschrift für Rechtspolitik (ZRP)* 2013 (forthcoming). An international comparison can be found in T. Hoppe/A. Thomas, Deutscher Bundestag, Wissenschaftliche Dienste, No 68/08 of 10.11.2008.

² Article 9, paragraph 4 and Annex X of the Rules of Procedure.

³ Interinstitutional Agreement between the European Parliament and the Commission on a common Transparency Register (2010/2291(ACI)), Official Journal of the European Union of 22 July 2011, L 191/29. See also M. Šefcović, *'Lobbyismus braucht Transparenz. Das neue Transparenz-Register des Europäischen Parlaments und der Europäischen Kommission'*, *Recht und Politik* 4 (2011), 198.

⁴ The background to the discussions is contained in the 'European Transparency Initiative' (European Commission, Green Paper of 3 May 2006, COM (2006) 194. This is examined in detail in: D. Hasler, *'Die Europäische Transparenzinitiative und „Legislatives Lobbying“'*, in: *Zeitschrift für Europarechtliche Studien (ZEuS)* 4 (2007), 503.

⁵ European Parliament Decision of 11 May 2011.

The present study is concerned on the one hand with the question of to what extent the European Union has the powers to impose an obligation upon interest representatives. On the other hand, it addresses the question of to what extent the boundaries set by virtue of fundamental rights are to be observed when creating an obligation to register. From the perspective of constitutional law, the transition to a system of mandatory registration would not merely involve a continuation of the existing concept. This step would not simply be of subordinate importance either. A system established on the basis of voluntary participation and that is based on the exchange of commitment and (access) privileges is qualitatively different from a system of mandatory registration that has the power to impose sanctions. A qualitative difference exists on the one hand in terms of its competences, because the obligation on the part of individuals and organisations to conduct themselves in a certain way cannot be effected by all of the forms of action available to the EU. A system of legal enforcement can also therefore be characterised as having qualitative meaning, because it demonstrates a fundamental rights dimension that a *quid pro quo* system does not have. The bodies of the European Union would take a decision of fundamental constitutional importance to this degree, if they were to intervene in the functional processes of interest representation in the policy-making process by means of regulations that require mandatory action.

2. THE CONSTITUTIONAL BACKGROUND TO REGULATIONS ON INTEREST REPRESENTATION

KEY FINDINGS

- Political communication between citizens, companies and organisations and MEPs and officials of the EU forms one of the key elements of a free democracy within the meaning of Article 10 of the TEU
- With the implementation of mandatory registration, the EU's legislative body would intervene in any legitimisation and control structures that provide its democratic legitimacy.
- Restraint and care must be taken when imposing restrictions of freedom of (even confidential) communication.

In a free democracy, the regulation of interest representation (or lobbying) is highly restricted and difficult to approach.

The right of citizens, companies and organisations to exercise their interests in the policy-making process forms one of the constitutive features of a free democracy in the sense of Article 10 TEU.⁶ Interest representation is communication between interested members of society and those with decision-making powers on behalf of the State. This form of communication is not only an expression of freedom, but is also a form of legitimisation. It is of central importance in the functioning of democratic institutions. In a system governed under democracy, policy-related decision-making processes cannot and must not take place in a 'vacuum' or in hermetic isolation. Access to those in State office with decision-making powers, asserting political positions and interests, observing the decision-making by MEPs and officials and monitoring administration are among the essential structural principles of an open, pluralistic and responsive democracy. Democratic freedom also entails the right to be able to speak to an official in confidence.

If the EU legislative body decides to create barriers to access between EU officials and citizens or apply conditions to such access, it is, in this respect, interfering in essential elements of the democratic decision-making mechanism. In view of the importance attributed to the 'free structure of political communication', there are no reasons whatsoever that suffice for this. Intervention can only be justified to protect the conditions under which a free political communication process itself can function. For example, this justifies the regulations to tackle granting of an undue advantage and corruption among officials: Those who are lured by the promise of money in spite of the power of the argument abandon the discourse framework of a liberal and pluralist democracy.

There are several reasons that primarily underlie the implementation of regulations that require membership of the Transparency Register: The MEPs and officials should be given information that they can use to assess the authorship and motives behind a political communication (transparency). The wider political world should be given the opportunity to observe who is involved in the process of law-making and implementation, with whom and with what financial resources. Finally, the notion of ensuring equal opportunities to access EU officials also plays a role.

⁶ See for example: M. Nettesheim, in: E. Grabitz/M. Hilf/M. Nettesheim (Ed.), *Das Recht der Europäischen Union. Kommentar zu EU und AEUV*, loose-leaf volume, version 2013, Art. 10 TEU, paragraph 1 ff.

In assessing the practicality and legitimacy of interventions in lines of communication between citizens and officials, two considerations are of importance from the perspective of constitutional theory. On the one hand, determining which acts of communication should be made subject to special regulations and rendered dependent on special requirements depends to a significant degree on how they are valued. The decision as to how political communication processes should be structured within a free democracy requires normative evaluation of the proper, appropriate and equal participation of citizens, companies and organisations. The decision with regard to permissibility and the mode of representation within political communication processes can only be taken on the basis of concepts of order that evaluate the 'appropriateness' of political communication in this way. The findings of comparative constitutional jurisprudence prove that to date no firm consensus has formed from this, however. Even when assessing whether an 'unequal balance of power' exists and whether 'bias' in need of correction occurs within political communication processes, there are no agreed benchmarks. Even more so, there is no agreement in judging specific necessities of response. So the question of whether commercial interest representation for third parties compels particular distance to be maintained and requires a special regulation has not found an agreed answer. Even in the question as to whether individual organisations (such as Churches, for example) should be granted privileges, there is no agreement among liberal democracies. Finally, opinions also vary in the question of whether sanctions are to be applied in association with an obligation of transparency and how these are imposed.

The regulation of interest representation therefore does not take place in a field in which pre-existing benchmarks that have been consensually approved and tested for function could have already developed among liberal democracies.⁷ Those are subject to negotiation and decisions within a political decision-making process. The EU legislative body is facing the question of to what extent it is willing to interfere with the essential principles and preconditions of its own legitimacy on the basis of political will. If the majority principle is applied here without obstacle, we are in danger of encroaching on the minorities' right of communication, which would pose a problem. It is clear that intervention therefore requires considerable restraint and care; seeking a consensual solution seems to be unavoidable in view of the principles of democracy.

On the other hand, any interference in the functional aspects of political communication brings about a change in future opportunities for communication. Those who are affected by the interference will have fewer opportunities in the future to bring about a revision of a decision within a democratic process once that decision has been made. Interventions in the communications process have a reflexive effect in this respect; they render themselves immune to review at a later date. In the case of a position or a standpoint that has been subject to special handling, let alone a reversal, it will be all the more difficult in the future to push for a revision or change to the decision. Interventions in the communication structures therefore affect the openness of the democratic decision-making process in the future. This constitutes another reason to exercise restraint and care in the regulation of interest representation.

This not does question the fact that the conditions for a political communication process to function require consistent and critical regard. All individuals must be given the opportunity for open, sufficient easy and equal access to officials. The communication process between officials and social interests must be protected from obvious aberrances and tangible

⁷ For a good overview of the variety of possibilities for creating these, see for example: Valts Kalnins, *Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes*, Centre for Public Policy (PROVIDUS), 2011.

undesirable developments. An entirely uncontrolled dynamic would be damaging. However, the aforementioned remarks make it clear that as far as regulating interest representation is concerned, the EU legislative body is acting in an especially sensitive area from the perspective of democracy. These considerations will become significant in the legal arguments later on.

3. ISSUES OF LEGAL AND POLITICAL DEFINITION

KEY FINDINGS

- The classification and evaluation of an obligation to register in the Transparency Register under constitutional law depends on the form it takes
- The competences of a regulation whose scope covers interest representation above a functional level in the areas of both EU legislating and implementation is to be evaluated differently to those of a regulation that concerns interest representation only in the area of a single function.
- For reasons of considering competences and fundamental rights, we need to distinguish between regulations that accord the general status of 'interest representatives' and regulations that govern the tangible impact on a specific process.
- With regard to evaluation, it also depends whether registration in a transparency register is associated with a service in return and how sanctions are imposed in the case of a contravention.

It is said that it takes two to lobby. Concerns regarding the regulation of interest representation therefore always revolve around a relationship between the private individual and the MEP or official. The classification and evaluation of such regulations under constitutional law therefore essentially depends on exactly what form the regulations take. A multitude of options are available to the EU legislative body in formulating them. With regard to the subsequent evaluation under constitutional law of a regulation that makes registration in a transparency register mandatory, the following aspects are important in particular:

3.1 Cross-functional or function-specific regulation of interest representation

Interest representation means to influence the opinion formation processes of State officials with decision-making powers. This may involve influencing the legislative process, the implementation (administration) or ultimately the legal judgment in a dispute. There are significant differences between each of these areas of scope in terms of the institution concerned and the function, as the legitimate function and role of interest representation in decision-making processes depends on the purpose of a decision. With regard to evaluation under EU law, it depends in this respect whether the regulation of interest representation concerns more than just a role performed on behalf of the State (legislating, implementation, jurisdiction) at a cross-functional level, or whether it only (specifically) concerns a single function.

The assessment of whether individual roles should be distinguished forms the basis of the organisation of powers within the European Union. Legislative procedure (Article 289 et seq. TFEU) is defined by provisions other than those for the area of EU administration (in general: Article 298 TFEU, specifically e.g. Article 108 TFEU). Judicial procedure has been defined elsewhere yet again. For each of these functions, there are competences that enable the further definition and development of the respective institutional, procedural and codetermination structures. A situation in which these differences are blurred must be avoided in view of the regulatory mechanism of Primary EU legislation.

In normative terms, the functional differences between different decision-making processes point to a need for a form of regulation that reflects the respective functional aspects in the areas of legislating, implementation and jurisdiction. The notion of ensuring the openness and accessibility of this process needs to be expressed first and foremost in the regulations on interest representation in the area of legislation. As decisions are taken in this process that affect everyone in principle, the process must be transparent to all as well. Everyone must also be treated equally *prima facie*. Conversely, interest representation in administrative and legal proceedings may be regulated with greater restrictions. An individual is only heard in administrative proceedings if this is provided for under administrative law. It is also the case in legal proceedings that interest representation is essentially restricted to those involved in the proceedings. While in principle it would not be permitted in normative terms to restrict accessibility of legislative procedure to individual persons, organisations or companies, this is commonplace in administrative and legal proceedings whose outcome only directly affects the parties involved in any case.

If the EU legislative body decides to create a uniform system for handling interest representatives, irrespective of these circumstances, this not only impairs the political efficacy and appropriateness of the regulations. It also has a direct legal significance. From the perspective of competences, the question arises as to whether it is possible to draw upon a function-specific competence rule (such as Article 298 TFEU) in enacting regulations that apply at the cross-functional level. From the perspective of fundamental rights, it also raises the question of the suitability and appropriateness of such restrictions upon freedom.

3.2 Justification of a general legal status or process-oriented regulation

In order to carry out an analysis according to constitutional law, it is also important to examine whether the regulation (that imposes an obligation) of interest representation activities takes place by according a general status, or is embedded in the formation of a specific decision-making process.

3.1.1. Characteristics of status as an 'interest representative'

The Transparency Register created by the European Parliament and the European Commission in 2011 is status-based: it provides for the creation of status as an 'interest representative', which 'should' be used by the named individuals and organisations. The addressed individuals and organisations are advised to adopt this status (by signing up to the Register) if they are 'engaged in activities falling within the scope of the register'. The status is offered —rather vaguely— to all persons 'engaged with EU policy-making and policy implementation'. This is examined in more detail in Annex I.

3.1.2. Generality and absence of specification of status

For the purpose of an evaluation of such a status-based regulation according to constitutional law, it is first of all important to consider that the status of an 'interest representative' is a characteristic that does not relate to a particular process and the positions expressed therein, but to a general quality. The attribution of this status is not restricted to any times or rooms in which any specific advance is made for the purpose of representing interests. The EU legislative body does not regulate any issue of the specific decision-making process nor does it provide grounds for any specific rights to participate in proceedings, but it does implement a regulation that precedes or lies outside of the scope of specific procedural law of the EU. This is important primarily where powers are

concerned: EU competence rules that serve to define decision-making processes cannot provide the basis for the establishment of a general status.

In terms of concept and theory of constitutional law, we can distinguish regulation methods from this that serve to determine and organise interest representation in a decision-making process in practice. This then does not (only) concern the rationale behind granting the status of 'interest representative', but also the regulation of how certain interests influence a decision-making process in practice. Regulation of this kind can be enacted on the basis of EU process powers.

3.1.3. Relevance of status to freedom and personality

An inherent quality of a regulation method that provides for a general status as an 'interest representative' is that it is of considerable relevance to fundamental rights: An individual deemed to be a 'lobbyist' is such in their entirety. Either someone carries that status or not. It is not possible to differentiate between a (general civil) definition with the structuring and implementation of EU law and a specific instance of interest representation. In particular, the individual concerned must (also) accept its status in society. A status-orientated transparency register is also highly personality-based; this is of importance with regard to assessment on the basis of fundamental rights, and particularly rights relating to personality.

3.1.4. The additional burden of a regulation that imposes obligations

As is well known, the current transparency register exists on a quid pro quo basis. Those who sign up to the register receive favourable treatment that would otherwise not be available to them or would in any case be only far more difficult to obtain. The Interinstitutional Agreement includes an offer that interest representatives may accept, but are do not required to do so. In this case, intervention in fundamental rights is not effected if the party is not entitled to the promised favourable treatment. The additional burden arising from voluntary membership of the register can be justified by means of a waiver of fundamental rights; this is not too much of a burden in any case, because it is possible to withdraw at any time.

With regard to an evaluation according to constitutional law of an obligation to register in the transparency register, this line of argument will no longer be used. A regulation that imposes an obligation would in any case restrict the freedom of interest representatives. As far as the weighting and evaluation of the intervention is concerned, it is, if nothing else, important to consider whether there are any (further) benefits associated with registration in the register to which an individual, a company or an organisation would otherwise not have access. It is likewise important to consider what type of sanction is to be imposed in the event of non-compliance.

4. EU POWERS TO IMPLEMENT AN OBLIGATION TO REGISTER IN THE TRANSPARENCY REGISTER?

KEY FINDINGS

- An obligation to register in the Transparency Register can only be justified on the basis of provisions granting powers that include the authority to act in respect of external parties.
- Decisions enacted by a body in observance of its capacity to act independently and Interinstitutional Agreements are not qualified to exercise control of external parties.
- Article 11 TEU and Article 15 TFEU do not provide any grounds for authority to act.
- Article 298(2) TFEU does not justify the implementation of the status of an 'interest representative'. The provision serves to define the EU's self-administration and does not provide a basis for regulations with regard to defining tangible involvement in processes, least of all enabling the definition of interest representation within the domain of EU legislation.
- Even if drawing upon the doctrine of 'implied powers', Article 298(2) TFEU cannot serve as the basis of powers to regulate interest representation in the area of EU legislation.
- If the EU legislative body were to create entitlement to regulate interest representation within legislative procedure on the basis of a provision governing the definition of EU self-administration, it would abandon a differentiation that would now be essential in the self-characterisation of the EU in constitutional law and policy.
- Therefore, only Article 352 TFEU can be considered as a basis for imposing mandatory registration in a general register.

4.1. Necessity of a regulation that affects external parties

This study will only examine the selection of a means of action by which the European Union is able to impose an obligation upon individuals, companies and organisations within the public sphere. Forms of action relating to (purely internal) self-organisation are insufficient to do this. The EU can therefore only achieve its regulation objective if it acts by means of a regulation, directive or decision.

4.2. Inadequacy of interinstitutional agreements and organisational decisions

It is not possible to justify an obligation of this kind, which is imposed on external parties, by means of a decision that is enacted by an EU body in observance of its self-organisation capacity. With this form of action, the EU bodies can only govern the respective relationships within the EU; it does not justify any obligation imposed on third parties. Even in an 'interinstitutional agreement' (Article 295 TFEU), this effect cannot extend to third parties. With such an agreement, the respective participating EU bodies can mutually coordinate their conduct. However, this agreement does not enable them to gain any authority to act that they do not also possess autonomously. If an EU body is not

authorised to justify an obligation on the part of third parties or organisations on the basis of its own jurisdiction, it cannot create this jurisdiction by means of concluding an 'interinstitutional agreement' either.

4.3. Analysis of the area of competence

According to the principle of conferral (Article 5(1) p.1 and (2) p.1 TEU) the European Union only acts within the limits of its competences that are conferred upon it by virtue of the Treaties (competence). In addition, it can only resort to those measures and take actions that are made available to it in the provisions of the Treaties relating to competence (instrumental competence).

4.3.1. Article 11 of the Treaty on the European Union and Article 15 of the Treaty on the Functioning of the European Union

The powers conferred upon the European Union are exercised in accordance with democratic legitimacy. In accordance with Article 11(1) TEU, 'the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action', while Article 11(2) TEU requires the institutions to 'maintain an open, transparent and regular dialogue with representative associations and civil society'. These provisions express the decision to structure the decision-making process in an open and transparent form. This obligation, which forms the basis for democratic cooperation and supervision also covers legislative activities. The provision does not, according to a general view, contain any legislative powers, however. It can therefore not be chosen as a basis for powers that can be used to implement mandatory transparency requirements in respect of interest representatives.

Transparency requirements are also formulated in Article 15 TFEU. In accordance with Article 15(2) TFEU, 'the European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act'. Furthermore, Article 15(1) TFEU makes provision for work to be conducted 'as openly as possible' 'in order to promote good governance'. The regulations re-specify the general objective of transparent and open decision-making practice for specific situations, without having provided grounds for legislative power.

Article 11 TEU and Article 15 TFEU therefore do not contain any competences that could support the enactment of a regulation that obliges interest representatives to register in a transparency register.

4.3.2. Article 298(2) TFEU

The achievements of the Treaty of Lisbon include provisions devoted to the development of direct EU administration, particularly in the area of independent systems and agencies. Article 298(1) TFEU legitimises the development of EU-administration, by stipulating that 'the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration'. At the same time, this provision of the Treaty imposes normative expectations on the EU institutions in question: They are to organise the administration that does preliminary work on their behalf in such a way that fulfils the described requirements of openness, efficiency and independence. In order to realise this objective, Article 298(2) TFEU grants the powers and competences to enact

provisions by means of 'regulations in accordance with the ordinary legislative procedure', which will enable the realisation of the envisaged 'open, efficient and independent European administration'.

In the discussion concerning the implementation of a mandatory transparency register, it has recently been argued that this provision could be invoked as the basis for powers to impose an obligation to register in a transparency register. An examination of this provision using the interpretation methods of EU law has clearly shown that it is not possible to use this provision in that way.

4.3.3. Relevant text

The wording of the provision relating to powers only covers regulations that serve to establish the 'European administration' referred to in Article 298(1) TFEU. The term is not defined in EU treaty law; there is also a certain degree of linguistic vagueness in the laws of individual Member States. According to the use of language in general and the terminology of the Treaties, it is nevertheless possible in any case to assume that 'administration' is distinct from legislation and decisions handed down in specific cases. It would contradict this use of language to extend also the term 'administration' to cover the domain of law-making and legislation.

The versions of Article 298(1) TFEU in other languages also use a term that is distinct from the concepts used in the domain of legislation and judicial rulings. The English version, for example uses the formulation 'European administration'.

Regulations whose scope is the structures, the organisation, the actions and the procedures of the 'European administration' form the immediately obvious scope of the competence provided for in Article 298(2) TFEU. This does not cover the reasoning behind the general status of an interest representative as being someone who is 'engaged with EU policy-making and policy-implementation'.

Nevertheless, the wording of Article 298(2) TFEU enables the enactment of all regulations whose purpose is to promote the objectives of Article 298(1) TFEU. The scope of Article 298(2) TFEU in this regard is therefore not limited to the domain of administration. The EU legislative body is also able to regulate other technical issues on the basis of Article 298(2) TFEU, if it serves the creation of an open, efficient or independent administration.

Against this background, it does not seem we can rule out the assertion that Article 298(2) TFEU forms a suitable legal basis for a mandatory transparency register, because the disclosure of interest representation can be said to contribute towards achieving the objectives of Article 298(1) TFEU. In this sense, it could be argued that (not openness, admittedly, but) efficiency and independence of EU administration would be promoted if the acting officials required information concerning the extent to which citizens or organisations who contact them are representing interests. That would already significantly stretch the meaning of the wording, however. This interpretation requires that the phrase 'to that end' in Article 298(2) TFEU is also extended to secondary purposes whose realisation promotes the primary purpose aimed at in the TFEU. This seems possible, but it is not actually self-evident from the wording.

The wording of Article 298(2) TFEU would in any case only cover a regulation that protects the efficiency and independence of the 'European administration'. A regulation that goes as far as imposing obligations upon all interest representation to EU institutions cannot be

understood from any reading of the provision according to its wording. If individuals, companies or organisations are placed under a general obligation to disclose whether they seek to influence decision-making processes in the EU, this relates to at most a small proportion of interest representation to the EU administration. In many cases, the individuals and organisations concerned will focus entirely on the area of legislation. The scope of an obligation to register in a general transparency register would therefore extend far beyond the scope covered by Article 298 TFEU.

The grounds for an obligation to register in a transparency register are therefore not covered by the wording of Article 298 TFEU. This is consistent with general opinion. There seems to be no viewpoint as a result of which the voluntary or mandatory membership of a general transparency register could be understood from the wording of Article 298 TFEU and that can be regarded as a regulation to create an administration within the meaning of Article 298(1) TFEU.

4.3.4. Genesis of the provision

The provision of Article 298 TFEU includes a concern that the European Convention pursued by adopting a regulation on the direct administrative implementation of EU law by EU bodies and EU institutions in Article III-398 of the Treaty establishing a Constitution for Europe (TCE). The regulation was in response to the wishes of the members of the European Convention with regard to the regulatory loophole, which therefore existed because the primary law —at the stage of the Treaty of Nice— only contained insufficient regulations on direct administrative implementation that were not set out in the Treaty according to any classification. Article III-398 of the Treaty establishing a Constitution for Europe was carried over into Article 298 TFEU without any significant changes by the Treaty of Lisbon.

The initiative to include this provision in the TCE was taken by the Swedish representative of the European Convention, Lena Hjelm-Wallén. On the basis of viewpoints expressed in the Nordic countries with regard to the administrative culture and openness of administration, she undertook the request to facilitate the embedding of the principles that also formed part of Article 41 of the Charter of Fundamental Rights as primary legislation in the TFEU. She primarily had the backing of the Nordic Member States, namely Denmark, Finland and Sweden to do this.

The story of the development of Article 298 TFEU clearly demonstrates the intention of the legislative body to set up a standards framework that would provide a normative direction in the further development of EU self-administration and performance of its role. Article 298 TFEU can therefore trace its origin to EU administrative and constitutional law. The provision outlines the requirements in relation to EU self-administration and provides for a foundation of competences that may be used for the ongoing development of that administration. Obliging individuals to be registered in a transparency register if they are attempting to influence EU decision-making was not what the legislative body had in mind. At no stage in the legislative process was this matter of concern envisaged to be the subject of regulation according to Article 298 TFEU.

4.3.5. Classification

In addition, the classification does not support the assumption that Article 298 TFEU could serve as a legal basis for an order by which interest representatives are required to register on a transparency list.

The provision is in keeping with the legislative procedure provided for in Articles 289-297 TFEU. It relates to a provision (Article 297 TFEU) that governs the signing, publication and entry into force of a legal act (whether it be in a legislative procedure, or in the area of delegated or implementing legislation (Article 290 TFEU and Article 291 TFEU)). The logically devised structure of the Treaty makes it clear that the regulations on legislative procedure should be finalised by Article 297 TFEU. This is followed by a, albeit brief, consideration of issues of administration in Article 298 TFEU. Article 299 TFEU then makes provisions for enforcement.

The position of Article 298 TFEU does not support the interpretation of the provision as a one concerning the implementation of transparency in legislative procedure, otherwise the legislative body would not have placed it after the provisions on legislative procedure.

4.3.6. Meaning and purpose

According to its meaning and purpose, Article 298(2) TFEU cannot be regarded as a provision on whose basis it is possible to issue an obligation to register in a transparency register either.

The purpose of the regulation of Article 298(1) TFEU is to close up a significant loophole in the regulation system of primary legislation. It contains provisions that grant EU bodies the organisational powers to regulate their interests with regard to rules of procedure. The legislative procedure is defined in detail in the provisions TFEU and the judicial organisation and law of judicial procedure are also covered. Conversely, the density of regulation in the area of implementation has fallen back noticeably. Though the expertise that the EU has in the individual areas of policy also encompasses the law on regulating the specific laws of administrative procedure in each area, there was no provision in place until the Treaty of Lisbon that made it possible to enact general regulations on the state of EU self-administration. This not only concerned the organisation of administration, but also the regulation of the law of administrative procedure. Article 298(1) TFEU therefore also forms a response to the discussions on whether the EU has the powers to enact a general law of administrative procedure.

In contrast, the implementation of a mandatory transparency register concerns a much more far-reaching issue of a different nature. It does not address the openness of EU administration, but rather the obligation of individuals, companies and organisations to disclose the intentions they are pursuing and the underlying interests. A mandatory transparency register requires citizens, companies and organisations to do something; it serves the EU officials and third parties in evaluating expressions of interest or representation. This means that the purpose of such a regulation is not the (self-)discipline of the EU, but rather the formulation of requirements concerning the conduct of citizens, companies and organisations; a mirror image, as it were. Teleologically speaking, this constitutes a diametrically different objective.

If Article 298(1) TFEU is to be used to achieve the purpose of implementing concepts of 'efficient administration', this is not equivalent to the purpose of being able to make citizens, companies and organisations into 'transparent citizens' and 'open companies or organisation', it is only because this conducive to administration. The primary purpose pursued by the legislative body with the enactment of Article 298(1) TFEU does not

encompass any desirable secondary purposes, the realisation of which could be of relevance to the fulfilment of the primary purpose.

Article 298(2) TFEU does not allow the purpose to be interpreted as: private individuals or organisations can be required to make a particular declaration of their intentions, their conduct or their proposition, only because this would be efficient in respect of the EU in an abstract way. At best, Article 298 TFEU could cover such behaviour by means of which influence could be exerted specific on an administrative process. This is not the case for a regulation that makes membership of a transparency register mandatory. The purpose of such a regulation is to justify an abstract status, but it gives no indication of whether an interest representative is able to exert influence on a specific administrative procedure or indeed does so.

From a teleological perspective, a regulation that is implemented by means of a comprehensive, mandatory transparency register cannot be based on Article 298(2) TFEU.

4.3.7. Interim conclusion

In view of the aforementioned considerations, it can be noted that the wording of Article 298(2) TFEU can be understood in such a way as to cover the implementation of a mandatory transparency register for individuals and organisations who are engaged in interest representation in respect of EU self-administration. It is already clear from the wording, however, that this understanding is not an obvious one.

In any case, the genesis and classification of the provision do not support such a broad understanding of the provision: they do not suggest that the purpose of the provision is to regulate the legal relationships of citizens and private organisations. It is also the case that, according to its meaning and purpose, Article 298(2) TFEU does not aim to provide a basis for restricting the freedoms of citizens and private organisations.

The more important grounds therefore do not support an understanding of Article 298(2) TFEU by which a mandatory register can be applied to interest representatives who are engaged in the area of EU administration. There is no doubt that Article 298(2) TFEU does not cover the implementation of a mandatory transparency register in which individuals who are engaged in interest representation in the area of legislation are required to register.

4.3.8. Article 298(2) TFEU and the invocation of implied powers

In view of the aforementioned considerations, we have established that, according to its wording, genesis, classification and purpose, Article 298 TFEU cannot form any legal basis whatsoever for the creation of a mandatory transparency register that (also) covers interest representation in the domains of legislation and the judiciary. Further to this, Markus Krajewski, Professor of International and European Law, recently expressed the viewpoint that the 'implied powers doctrine' could enable Article 298(2) TFEU to be used as a legal basis for such a regulation.

The validity of the implied powers doctrine in EU law is without question, as is the case in international law of international organisations. The European Court of Justice already developed rules on the existence of unwritten powers some time ago and made it the subject of established case-law. However, the formulations of the doctrine in relevant

decisions of the European Court of Justice are not always congruent. In enforcement in practice, slight differences and shifts continue to emerge.

4.3.9. General understanding of the 'implied powers' doctrine: the necessity to exercise express powers

The validity of the implied powers doctrine in EU law is without question (as is the case in international law). According to the generally used definition, the Treaties of EU law are interpreted in such a way that the EU not only possesses expressly conferred powers, but also those unwritten powers that are necessary to be able to exercise the expressly conferred powers in a meaningful way.

The implied powers doctrine ensures that existing powers do not fall into obsolescence. The doctrine thereby has a limited scope of application: It does not concern non-specific extension of competences or rationalisation of competences, neither does it serve to confer any powers on the EU that are desirable for political reasons or that are useful in increasing the efficiency of action. If it cannot be argued that an existing power would lose its purpose without being accompanied by unwritten powers, it is not possible to extend this existing competence. In the case law of the European Court of Justice, the requirements that serve to justify the 'necessity of rationalisation' are not uniformly applied, however. Where measures that enhance the implementation of EU are concerned, the CJEU sets the threshold for applicability of the doctrine rather low some of the time.

Accordingly, the regulations on a mandatory transparency register can only be based on Article 298 TFEU in conjunction with the implied powers, if the expressly conferred powers could not acquire any stand-alone meaning without the enactment of such regulations. It would therefore need to be demonstrated that Article 298 TFEU could not be used in any meaningful way, if the EU were not able set up a mandatory transparency register at the same time. This cannot be demonstrated.

Already in the domain of administration, there is no basis on which to demonstrate that the meaningful application of Article 298 TFEU would require a mandatory transparency register to be set up in order to establish an open, efficient and independent EU self-administration. It would require evidence that the efforts to achieve the objectives aimed for in Article 298(1) TFEU would be doomed to fail, or would in any case be substantially impaired, unless membership of a transparency register were to be made mandatory for all interest representatives at the same time. In view of the intrinsic value of the organisational and procedural regulations on EU self-administration (irrespective of the issue of regulating interest representation), it is not possible to make such a connection.

It is even less possible to claim that Article 298 TFEU can only be applied meaningfully if membership of a mandatory transparency register is made a condition for interest representation in legislative procedure. The enactment of regulations on EU self-administration in accordance with Article 298 TFEU does not depend on whether regulations on the status of private individuals within legislative procedure have been enacted at the same time.

In the 'Legal Study: Legal Framework for a Mandatory EU Lobby Register and Regulations' presented by Markus Krajewski, the applicability of the implied powers doctrine was postulated by the following argument: Article 298 TFEU may only regulate interest representation in the domain of administration, but the regulation of activities of interest representation in the domain of administration alone is not possible. For that reason, it is

argued, the EU must be entitled to powers to regulate interest representation in the domain of legislation. This line of reasoning can first be countered with the argument that in terms of regulation it would automatically be possible to restrict the scope of a mandatory transparency register to interest representation in the domain of EU administration. Krajewski does not demonstrate why this would not be possible in his view. It is granted that the efficiency in practice of such a register would be limited in that case, but then the theory of implied powers is not exactly one that grants the EU the most efficient of all means of action.

What is striking when analysing Krajewski's arguments is that they do not actually question to what extent the meaningful application of Article 298 TFEU depends on membership of a transparency register being made mandatory in the domain of legislation. Krajewski restricts himself to his finding that the regulation of interest representation in the administration domain would logically accompany that in the legislation domain. He makes an inference of an (allegedly) existing competence from the usefulness of an approach used in the EU and therefore no longer confines himself to the scope of the implied powers doctrine. Even if it were possible to see a sufficient degree of coherence between the objectives pursued by Article 298 TFEU in defining EU self-administration and the regulation of interest representation, this does not yet mean that regulation of activities in the legislation domain would be necessary for the meaningful application of Article 298 TFEU. As far as the theory of implied powers is concerned, the difference between legislation and administration cannot be easily eliminated.

Therefore, implied powers cannot serve as the basis for the implementation of a mandatory transparency register. The meaningful application of Article 298 TFEU does not require such rationalisation by means of unwritten powers; the provision has a stand-alone and meaningful scope of application even without such 'artificial manipulation'. The development of an open, efficient and independent administration does not necessarily require potential interest representation to the EU administration to be made subject to mandatory registration in a transparency register. And it is even less possible to regulate interest representation in the legislation domain by means of Article 298 TFEU in conjunction with implied powers.

4.3.10. Fruitlessness of further understanding of the implied powers doctrine

The case law of the European Court of Justice has shown on isolated occasions that the implied powers doctrine is used in a different sense. In these decisions, the CJEU did not assume that implied powers served the effectiveness of expressly conferred powers. Rather, it views implied powers as a tool that can be implemented if it is appropriate in the fulfilment of a task. As a result of this conception, the application of implied powers does not solely relate to ensuring the effectiveness of written competence rules. Rather, it is possible to infer the (unwritten) competence directly from the role.

The evaluation of these —isolated— decisions is not an easy task. The CJEU has never expressly admitted that it is possible to infer the existence of an (unwritten) competence directly from a designated role. The reluctance to do could be attributed to the fact that this procedure would run into considerable objections both in law and in integration policy: the essential requirement for a written competence, which is implied by the principle of conferral, would be undermined if it were possible to infer the existence of beneficial implied powers directly from the designated purpose role. Almost any number of aims could be inferred from Treaty provisions, particularly Article 3 TEU. If this was always also

accompanied by an (unwritten) power, not only would we override the limiting function of the text of the Treaty, the EU would in particular possess a range of powers equivalent to those of a sovereign country. It would be possible for the German Federal Constitutional Court, which views adherence to the limits of competence as a requirement for the democratic legitimacy of the EU, to draw limits from the inference of implied powers from the role.

In my view, this means that a conception of the implied powers doctrine, from which it is possible to infer the existence of competence from a designated purpose or role, has no basis in EU law. The isolated decisions of the CJEU cannot be regarded as an expression of established case law. They were enacted at a time when sensitivity to adherence to the principle of conferral was not quite as great as it is today.

Incidentally, if direct inference of implied powers from the role had been permitted, there would have been objections against the assumption that the EU would have been authorised to implement a mandatory transparency register. This is because the fulfilment of its role does not necessarily depend on whether it provides for membership of a register within the domains of legislation and administration. Even a broad version of the implied powers doctrine would not put the EU in a position to be able to take all measures that would actually or supposedly be meaningful in fulfilling its role.

4.3.11. Objections to the application of Article 298 TFEU on the basis of constitutional law

The argument that a mandatory transparency register could be enacted on the basis of Article 298 TFEU (possibly in conjunction with implied powers) runs up against yet more objections.

First of all, if the ordinary legislative procedure were to be used, a decision would be made in the Council with a qualified majority and the majority rule would also be applied in the European Parliament. In the introductory passages of the expert opinion, it is made clear that the regulation of requirements concerning communication access to EU MEPs and officials concerns a task that should not be handled according to a majority/minority vote. This does not support the application of Article 298 TFEU.

Secondly, there would be concerns relating to the separation of roles and powers. The formation of a difference between legislative procedure (ordinary legislative procedure, special legislative procedure, etc.) and the implementation of EU law by means of administration forms one of the greatest achievements of the EU in the process of differentiating roles as pre-federal sovereign entity. The EU has transcended the level of a regulatory authority whose role and remit exists in the technical-administrative implementation of programmes mapped out in treaties. It has become a democratically responsible sovereign entity with genuine policy-making power. Law-making in the EU is not merely implementation, but is in fact policy-making. That is precisely why interest representation is proving to be of significance to individuals and organisations.

The difference between policy-making and executive implementation is the expression of particular level of development of a system of sovereignty laid down in law. The EU would take a backward step from the stage of development it has achieved, if it were to adopt the position that there is such a minimal difference between the domain of legislative procedure and legislation and the domain of EU self-administration that Article 298 TFEU in conjunction with implied powers could also be applied in the domain of legislation. The

decision-making of the EU legislative body —and particularly that of the European Parliament— is not executive implementation decision-making. It could be feared that the European Parliament could even delegitimise itself, if it were to assign interest representation relating to its decision-making process to the concept of 'open and efficient administration'.

In the question of whether interest representation in the domain of legislation should be addressed with competence provisions designed for the purpose of EU self-administration, the bodies of the EU have adopted a position based on constitutional law and policy in this respect. The decision extends deep into the history of EU constitutional law. The EU bodies should not question the degree of differentiation of function between legislation and administration by applying Article 298 TFEU. The self-conception on the basis of constitutional law as being an organisation structured to separate powers and roles, and in which policy setting (and interest representation relating to this) and executive implementation are made distinct from one another, should not be abandoned solely in order to enable a competence rule whose wording and purpose is not suitable to still be applied in some way.

4.3.12. Interim conclusion

The aforementioned considerations lead us to the conclusion that a mandatory transparency register that also covers interest representation in the domain of legislation cannot be based on implied powers. The meaningful application of Article 298 TFEU does not depend on whether the existence of such unwritten competences is being postulated. Even if this were viewed differently, Article 298 TFEU in conjunction with implied powers could only provide the basis for a regulation on interest representation in respect of EU self-administration. Interest representation in the domain of EU legislation lies beyond the scope of these competence rules.

4.3.13. Article 352 TFEU

In accordance with Article 352 TFEU, the EU is able to adopt measures necessary within the scope of policies defined in primary legislation in order to achieve the aims of the Treaty, if it has not been assigned the powers necessary to do this from anywhere else. Article 352 TFEU provides for the rationalisation of competences that enables the EU to take the measures necessary in order to implement a policy. In assessing the question of which measures are teleologically 'necessary', the EU legislative body is to be granted further discretion that is only subject to limited examination by the CJEU.

Article 352 TFEU is restricted to the rationalisation of the 'policies defined in the Treaties'. According to a strict understanding of this Article, it would not cover the regulation of interest representation, because that would constitute a cross-institutional issue. In policy-making practice, however, the term 'policies' cannot only be taken to refer to the areas of activity described in TFEU as 'policies'. The case law of CJEU does not require a restrictive understanding either. Against this background, the regulation of interest representation in EU decision-making processes can be regarded as an expression of forming a 'policy'. The justification for the status of an 'interest representative' can be understood to a rationalisation of Treaty provisions on the institutions and processes of legislation and implementation. Even if it does not —in the narrowest sense— constitute a measure to achieve a 'policy', it still serves to attain the objectives of the Treaty at a fundamental

level. Article 11(2) TEU contains a contractual safeguard of the application of Article 352 TFEU along with the objective of transparency.

Article 352 TFEU is not restricted to measures that concern the internal functioning of the EU institutions. The competence rule provides the basis for the enactment of legal acts that are legally binding in respect of external individuals, companies and organisations.

According to this, the implementation of a mandatory transparency register can be based on Article 352 TFEU. It would require the enactment of a Regulation on the basis of Article 352 TFEU; The European Parliament and the European Commission could not justify obligations imposed on private individuals and organisations directly on this basis. Such a Regulation would, in accordance with the principles of precedence of EU law, take precedence over the respective laws of Member States as well as the rights of private and public organisations in the Member States.

4.3.14. Unwritten competences by virtue of 'nature of the matter'

It has been remarked in conclusion that the concept of 'competence by virtue of the nature of the matter' cannot call into question what has been established above. 'EU competences by virtue of the nature of the matter' are deemed to be powers that can only be regulated on the basis of the characteristics of the matter to be regulated. For example, the decision on the logo of the EU cannot be taken by Member States individually, but only by the legislative body or the EU institutions. There is some lack of clarity with regard to the exact status of this category in the theory of EU competence rules. What is certain in any case is that with this concept, it is only possible to make assertions on which domain (EU or Member States) a particular regulatory matter is to be assigned. The concept neither indicates which of the different competence rules of a particular domain is relevant, nor can it transcend the boundaries that form the basis of the principle of conferral. The structure of the division of competences provides for a possibility by which a matter can be settled according to the nature of the matter only by the EU, but the EU does not possess the legal power to regulate. In this case, there is no possibility for a Regulation to exist.

In light of these facts, the category of 'competence by virtue of the nature of the matter' cannot serve as the basis for a regulation to implement a mandatory transparency register. It is correct to say, though, that such a Regulation cannot be created by Member States individually, but only by the legislative body or the EU. Article 352 TFEU provides the EU with a competence that enables such a Regulation. No further conclusions that extend beyond the content of Article 352 TFEU can be drawn from this category.

4.4. Interim conclusion

According to the aforementioned findings, a regulation that provides for mandatory registration in a transparency register can only be enacted on the basis of Article 352 TFEU.

5. FRAMEWORK IN ACCORDANCE WITH FUNDAMENTAL RIGHTS

KEY FINDINGS

- If individuals, companies and organisations are obliged to register in a transparency register, this constitutes an intervention in fundamental rights.
- In any case, it affects freedom of expression and information (Article 11 of the Charter of Fundamental Rights of the European Union), which also incorporates the right to approach MEPs and officials in confidence. In so far as interest representation forms part of the purpose of a business, the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights) is also affected. Finally, a person's right to protection of privacy (Article 7 in conjunction with Article 8 of the Charter of Fundamental Rights) can also be affected.
- Whether or not it can be regarded as a proportionate intervention depends on the formulation of the regulation that obliges these parties to register.

The enactment of a regulation that makes membership in a transparency register mandatory also extends into the domain of fundamental rights. The justification of such an obligation has a restrictive effect upon freedoms and it also affects aspects of fundamental rights to protect individual rights (privacy).

5.1. Freedom of political communication

The justification for a legal obligation to disclose whether an individual, a company or an organisation is engaged as an 'interest representative', intervenes in the freedom of expression and information provided for in accordance with Article 11 of the Charter of Fundamental Rights (CFR).

Freedom of expression and information encompasses not only communication between (private) individuals, but also the freedom to approach MEPs and officials and to present positions and interests to them. While there are no decisions by the European Court of Justice available to date on whether freedom of expression and information also covers freedom of interest representation, it is obvious that this freedom must indeed also cover the right to political expression. This right to political opinion cannot logically be restricted to public statements. Even the demonstration of political interests within a narrow and confidential context must —as a manifestation of democratic co-determination— be granted the protection of a fundamental right. If we were to cease to protect this form of political communication, a central area of liberal and democratic expression of freedom would have fallen into the sphere of influence of sovereign power. If the provision for freedom of expression and information could not be applied to interest representation, a sovereign entity could ban it in its entirety, without violating guarantees of fundamental rights.

Even if interest representation in a free and pluralistic system is to be protected as under fundamental rights, interventions and restrictions are not impermissible per se. Even freedom of expression and information is subject to restriction. However, when imposing

restrictions, the EU legislative body must have a legitimate purpose in mind and must act proportionately. In this regard, the legislative body is granted further freedom of judgment and formulation in determining the objectives that it is to pursue in accordance with the established case law of the CJEU. In view of this, there is little doubt that the EU legislative body would be pursuing a legitimate concern if it were to take measures that would create transparency regarding the influence exerted by represented interests on the legislative or implementation process within the EU.

On the other hand, the suitability of the measure has already proved to be not entirely apparent. The implementation of a mandatory transparency register would reveal whether an individual or organisation is engaged at all in interest representation, and it would also reveal the amount of financial resources involved, if the obligation were to also require the disclosure of the number of individuals involved or the budget. What would not be evident, however, is whether and how influence would be exerted on a specific decision relating to EU legislation or implementation. Transparency in specific EU legislative or implementation procedure can only be achieved, at most, in part, using regulations that assign a general status. The obligation to register in a transparency register only offers a minimal degree of effectiveness in this respect. In view of the practical experience of the CJEU in examining the suitability of a measure only on the basis of obvious misjudgements, the limited suitability of a general transparency register alone will not be capable of bringing about a violation of fundamental rights.

In addition, no obvious necessity for a mandatory transparency register has been demonstrated. In view of the support demonstrated for the present transparency register, it raises the question of whether it even requires the implementation of mandatory membership in order to safeguard the objective of providing a sufficient level of transparency in specific legislative and implementation procedure. Even the current regulation reveals considerable information concerning the line-up of individuals and organisations engaged in interest representation. However, a measure that impacts on fundamental rights only then lacks necessity if an alternative approach to regulation has the same degree of effectiveness, with a lesser degree of intervention. It would therefore require evidence that the current regulation is equally as effective as a mandatory register in achieving the objective of comprehensive transparency of legislative and implementation procedure. Whether this evidence could be produced seems doubtful.

A regulation to implement a mandatory transparency register could also lack necessity in yet another sense. It was implied earlier that it is conceivable not to impose a particular status on interest representatives, but to prompt them to disclose the specific influence they intend to exert on specific decision-making processes. Such a method of regulation would be process- and decision-orientated. In this case, we would not be concerned with an abstract status, but rather with transparency of a specific EU legislative or implementation procedure. Such an approach to regulation would undoubtedly increase transparency to a greater extent than a general status-orientated transparency register. However, there would only be difficulty in implementing this approach to regulation in practice; the question of when the threshold to interest representation in a specific procedure is exceeded is difficult to answer in terms of regulation in practice, and it is even more difficult to implement in legal practice in terms of a sufficiently effective solution. Against this background, an ambivalent picture emerges: in principle, a process-orientated approach would have less of an impact on individuals, companies and organisations. No one would have to acknowledge their abstract status as a 'lobbyist'; rather, only specific areas of influence would need to be disclosed. With this specific area of disclosure, however, such a regulation would, for its part, have a significant and far-reaching effect on the exercising

of freedom of expression. In legal practice, administrative burdens based on a regulation of this kind would be able to be of such scope that they cannot be regarded as a milder form of intervention.

Finally, it has been demonstrated that a regulation to make registration in a transparency register mandatory is not without its problems with regard to aspects of suitability either. The EU legislative body bears a considerable burden of justification if it restricts the fundamental freedom to be able to approach political representatives or EU officials in confidence, since the ability of members of the political community to speak to representatives in confidence and outside of the public domain also forms a core principle of democratic freedom.

An assessment of suitability is to involve a consideration of the end versus the means, which is to take account of the weight of restriction of freedom on the one hand and the benefit achieved by regulation on the other, and this is first of all determined by the extent of the actual scope of application. The earlier we set the threshold of the transition from general political engagement to interest representation, the more impact an intervention in freedom of expression will have, and the more far-reaching the definition of what constitutes interest representation, the greater the burden of justification. In view of aspects of constitutional law, it should be noted in this regard that it would be necessary to form a sufficiently precise definition of the scope of the obligation. The present formulations in the Interinstitutional Agreement would not be sufficient to fulfil the requirements of an obligation reinforced with sanctions.

The extent of the personal scope covered by the obligation should also be considered as part of the assessment of suitability. In principle, the narrower the scope, the less problematic the regulation will turn out to be in terms of affecting fundamental rights. Accordingly, a mandatory transparency register that only applies to individuals and organisations that represent the interests of third parties for commercial purposes would be easier to justify than a register that also applies to individuals who are pursuing their personal (political) interests. However, any restriction of the (general) scope of application would, for its part, increase the burden of justification in relation to aspects of equal treatment. If, within the regulation's scope of application, comparable individuals or organisations are treated unequally and exceptions are made or special status is granted, this would require special legitimisation.

For the purpose of evaluating the appropriateness, it is also necessary to examine the system of sanctions that is applied in the event of non-compliance. The more severe the sanction laid down by the legislative bodies at EU level, the more difficult it will be to justify a regulation requiring the introduction of a compulsory transparency register. The withdrawal of privileges (internal ID passes etc.) is considerably less severe than the threat of sanctions of an administrative nature or sanctions similar to those handed down under criminal law.

These considerations make it clear that the compatibility of a regulation requiring the introduction of a compulsory register with fundamental rights is not something that can be evaluated on an abstract level. Such an evaluation will more likely depend upon the wording of the regulation in question and especially upon the decision regarding the threat of sanctions. Any legislative body at EU level with an intention to implement a regulation that takes into fundamental rights into account will allow restraint and caution to prevail, even before the threshold of an obvious contravention of (of fundamental rights) is actually reached. In order to demonstrate its respect for fundamental rights, the legislative body in

question will wish to exercise restraint when it comes to imposing restrictions upon the fundamental freedom of opinion of individuals representing particular interests.

5.2. Freedom to conduct a business

The Freedom to Conduct a Business (Article 15, paragraph 1 of the Charter of Fundamental rights (CFR)) will also be affected by any regulation requiring the introduction of a compulsory Transparency Register. The freedom that is protected under fundamental rights also includes the ability to assert one's commercial interests by bringing them to the attention of officials and elected representatives. The Freedom to Conduct a Business of individuals and organisations, who, in order to represent their commercial interests, set out to influence political and administrative decision-making processes, also includes the right to decide for oneself, whether or not to avail oneself of the status of a 'lobbyist' for that purpose. To that extent, the Freedom to Choose an Occupation, which grants protection against any obligation requiring disclosure or self-incrimination, then comes into play as a negative fundamental right.

Against this background, any justified obligation to become a member of a register would constitute an incursion into the freedom to conduct a business that would affect an individual's fundamental rights. This would certainly be the case, in the event that an occasional intervention in order to promote commercial interests were to justify an overall and longer-lasting obligation requiring individuals to take on the status of 'lobbyist' in the context of a register. A regulation that stipulated compulsory membership of a transparency register would, in this respect, differ from a regulation requiring the disclosure of specific influences exerted upon decision-making processes. Up to the present time, it has not yet been clarified, whether the fundamental right accorded by virtue of Article 15 of the CFR gives rise to a (negative) entitlement to influence specific decision-making processes secretly and unknown to the public, as a means of pursuing one's commercial interests. There are also good reasons to assume that Article 15, paragraph 1 of the CFR does not include an entitlement to confidentiality in this regard. There is no need for the democratic freedom of expression and the freedom to conduct a business to function along parallel lines.

In terms of its scope, the protection of the right of commercial stakeholders not to be obliged to take on the status of 'lobbyists' goes no further than to protect an individual's freedom of expression. In accordance with the observations outlined above, any assessment of the proportionality will depend upon the way in which the regulation is worded in each individual case. A compulsory transparency register may, but is not obliged to be, proportionate.

5.3. Protection of Privacy

Finally, the introduction of compulsory membership of a transparency register may also affect the fundamental guarantee of privacy afforded by Article 7 of the CFR. A compulsory regulation would constitute a considerable infringement of the freedom of an individual or an organisation to decide the manner in which it presents itself to the public and the information it uses for that purpose. To that extent, a compulsory register would bring with it a limitation of the freedom of public self-expression that affects individuals and

organisations – especially in the area of data and information relating to specific individuals (Article 8 of the CFR).

Up to the present time, no definitive clarification has been given regarding the extent to which the fundamental right afforded by Article 7 of the CFR can in fact be applied to this particular sub-dimension of privacy. Up to the present time, no definitive clarification has been given regarding the extent to which the fundamental right afforded by Article 7 of the CFR can in fact be applied to this particular sub-dimension of privacy. A person who asserts his/her interests in a confidential manner will only be able to lay claim to the protection in the capacity of a commercially active stakeholder. The lawyer's privilege enjoys special protection in that regard. The cautious and balanced considerations referred to above clearly demonstrate the small extent to which the dogmatics relating to the scope of protection afforded by Article 7 of the CFR have been consolidated thus far.

If one were to regard a regulation requiring the introduction of a compulsory transparency register as an infringement of the right to privacy afforded by Article 7 of the CFR, any justification of this would be dependent upon the proportionality of that infringement and in that particular regard, one's ability to undertake a justified evaluation will depend, in essence, upon the precise manner in which the register itself is implemented.

6. OUTCOMES

The considerations outlined above lead one to the conclusion that the EU could only introduce a Transparency Register on the basis of Article 352 of the TFEU. The stipulations in Article 11 of the TEU and Article 15 of the TFEU do not constitute any competence standards. Article 298, paragraph 2 of the TFEU does not provide a basis for a compulsory regulation that is intended to introduce transparency to the representation of interests within the procedure for the issuing of standards within the EU. The concept of 'implied powers' is also insufficient in order to override the limited scope of Article 252 of the TFEU and in order to provide the EU with regulatory powers in relation to the issuance of standards. The concept of 'implied powers' is also insufficient in order to override the limited scope of Article 252 of the TFEU and in order to provide the EU with regulatory powers in relation to the issuance of standards.

The introduction of a compulsory transparency register would have an impact upon fundamental rights. The fundamental rights affected would be the right to freedom of expression, the freedom to conduct a business and possibly also the right to the protection of privacy. It will depend upon the specific form in which the register were implemented – especially from the material and/or personal field of application and the sanctioning of contraventions - whether and to what extent such infringements could be justified in terms of their proportionality.

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